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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1294~~ 108

SAMUEL MONASTERSKY,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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# Supreme Court of the United States

**October Term, 1965**

SAMUEL MONASTERSKY,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Monastersky prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 23, 1966.*

### Citations to Opinions Below

The opinion of the Circuit Court of Appeals is not yet reported and is printed as Appendix A and Judgment as Appendix B to this petition.

### Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 23, 1966. No motion for reargument was made. Mr. Justice Harlan extended petitioner's time in

* Co-appellants Bentvena and Struzzieri in the Court of Appeals below are, we believe, also perfecting petitions for writs of certiorari. However, as they moved for reargument, their petitions will be filed at a later date.

which to file a petition for a writ of certiorari to April 23, 1966. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether active participation in a narcotics transaction constitutes possession of narcotics sufficient to invoke the presumption contained in § 174 of Title 21 U.S.C.

2. Whether an incidental and momentary touching of narcotics contraband, physically possessed by others, which is incidental to active participation in a narcotics transaction, is sufficient to invoke the presumption contained in § 174 of Title 21 U.S.C.

## Statutes Involved

TITLE 21, SECTION 173, UNITED STATES CODE

§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes."

TITLE 21, SECTION 174, UNITED STATES CODE

§ 174. Same; penalty; evidence.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be

imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

## Statement

The petitioner Monastersky was convicted along with one Bentvena and one Struzzieri, of two counts of substantive violations of the United States Code, Title 21, §§ 173, 174. One count charged a narcotics transaction on January 6, 1959, and named Struzzieri as a co-defendant, and the second count charged a narcotics transaction on January 13, 1959, and named both Bentvena and Struzzieri as co-defendants. The present trial was a retrial after reversal, *United States* v. *Bentvena*, 319 F. 2d 916 (2nd Cir., 1963), based on an improper joinder into a so-called "mass conspiracy". The shape of the government's proof as to Monastersky was this:

Federal Narcotics Agent STEPHEN GIORGIO testified that on the evening of January 5, 1959, he went with a special employee of the Bureau of Narcotics to 210 East 116th Street where he was introduced to MONASTERSKY. They discussed the purchase of narcotics and the agent was told that the price was $6,000 for half a kilogram which would be pure and would come from an "Irish connection" of MONASTERSKY's On the following day he called MONASTERSKY at a number which he had been given and ordered

half a kilo and was told by MONASTERSKY to meet him at 10:15 that evening at the same place, which he did. MONASTERSKY then arranged to meet him at 87th Street and York Avenue and from there they entered 448 East 87th Street and went to Apartment 3-B which was listed in the name of Phillips. (3-12)* He was there introduced to RICHARD MCGOVERN, who produced a package from which the agent tested a sample. MCGOVERN asked for the $6,000 and the agent insisted that the three of them go to his vehicle. At the vehicle the agent handed $6,000 to MCGOVERN, who handed him the package. (12-17) He thereafter marked the package for identification and gave it to Agent MANGIARACINA, who was in the vehicle. (18-24)

On January 13th he called MONASTERSKY and told him that he was satisfied with the merchandise but not the price. MONASTERSKY asked if he was ready to negotiate further and when he said yes MONASTERSKY told him to meet him at York Avenue and 87th Street that evening, which he did. When they met, MONASTERSKY told him that "RICH" was unable to use the apartment at 448 East 87th Street, but had rented another apartment at 525 East 88th Street. They went to that address to Apartment 2-H, which was listed under the names of CONNORS and MCGOVERN. (24-26) The agent overheard MONASTERSKY say "Okay, Rich, we'll be back at 9:30", and MONASTERSKY told GIORGIO to meet him there again at 9:30. At about 9:25, while he was waiting in front of the building, he observed BENTVENA and STRUZZIERI enter the building and shortly thereafter MONASTERSKY emerged and said "Let's take a walk". MONASTERSKY suggested that he bring the

* Numbers in parentheses refer to pages of the typewritten transcript of the trial unless otherwise indicated.

money up to the apartment and GIORGIO countered with the suggestion that he bring his partner, who had the money, to the vestibule. He signalled to Agent MANGIARACINA who joined them in the vestibule, but waited while GIORGIO and MONASTERSKY went up to the apartment from which BENTVENA and STRUZZIERI were emerging. (26-29) After they were in the apartment a few minutes the doorbell sounded and McGOVERN went to the door. A few minutes later he came back to the center of the room where GIORGIO and MONASTERSKY were seated and took a package from under his robe and put it on the table. (42) The package was a brown paper bag containing a plastic bag and GIORGIO tested the contents and talked with McGOVERN about the price for three kilos. (43-45) McGOVERN asked him if he had the money and he said no and went outside the door to Agent MANGIARACINA who came up and handed him a white envelope which he gave to MONASTERSKY who then handed him the package. (45-47)

On cross examination, Agent GIORGIO conceded that he had testified at a previous trial that on the second occasion McGOVERN, rather than MONASTERSKY, had given him the brown paper bag which he told them he wanted to watch to avoid any possible switch. (60-61)

Agent ANTHONY MANGIARACINA testified that on January 6, 1959, he drove Agent GIORGIO to 116th Street and 3rd Avenue and thereafter drove him to York Avenue and 87th Street where he saw GIORGIO and MONASTERSKY meet and enter 448 East 87th Street and about 15 or 20 minutes thereafter emerge from the building with RICHARD McGOVERN and come over to the car. Agent GIORGIO, MONASTERSKY and McGOVERN went to the back of the car and GIORGIO handed McGOVERN a white envelope and took

a package from McGovern. The envelope contained $6,000. (85-93)

On January 13th he drove Giorgio to York Avenue and 87th Street where Giorgio joined Monastersky and walked with him out of sight. Giorgio returned to the car and at about 9:30 they parked near 525 East 88th Street and Giorgio went to the front of the building. After a period of time Giorgio signalled to him and he went over and was introduced to Monastersky. They all went inside and he remained downstairs while Giorgio and Monastersky went upstairs. Struzzieri and Bentvena came down the stairs and left the building; about 10 minutes later they re-entered the building and went back upstairs and then very shortly thereafter came back downstairs and left. About 15 or 20 minutes after Bentvena and Struzzieri left, Giorgio called from the landing and Agent Mangiaracina went up toward the landing where Giorgio and Monastersky were standing. (100-107) Giorgio asked for and took the envelope containing $6,000 and passed it to Monastersky. (107-109)

On cross examination Agent Mangiaracina was taxed with his testimony in the 1960 trial that he could not see to whom the envelope was passed (118) and his testimony in the 1962 trial in which he testified that Agent Giorgio "did something" with the envelope (121) and conceded that the present trial was the first time that he had indicated to anyone while under oath that it was Monastersky who had received the envelope from Giorgio on the 13th. (121) He conceded that he had never seen Monastersky hand anybody a package. (123)

The testimony of the remaining agents, Leonard Schrier, Charles Ward, Ivan Wurms, Benjamin Fitzgerald and

Narcotics Bureau Clerk MORGAN, was essentially corroboration by their surveillance of the movements of MONASTERSKY from place to place and was primarily directed to the activities of BENTVENA and STRUZZIERI, except that Agent SCHRIER did overhear a conversation between STRUZZIERI and one ORLANDINO in which ORLANDINO said "I hope this guy trusts Sammy with the money the next time," (176) apparently referring to MONASTERSKY. The government chemist testified as to his analysis of the package as heroin.

In the Court of Appeals, Monastersky contended that failing a showing of possession, the government had failed to prove importation and knowledge thereof and could not rely on the presumption contained in §§ 173, 174 of Title 21 to fill out that gap in its proof. The Court of Appeals rejected this contention, relying upon so-called "constructive possession," and said:

> " . . . We disagree with appellant. We believe the evidence in this case established that Monastersky had, on both occasions, power to control the disposition of the heroin sufficient to constitute 'possession' within 21 U.S.C. § 174."

Thus "power to control the disposition" was substituted for the statutory "possession" as a base for invoking the presumption of § 174. Congress did not make the presumption of § 174 applicable to one who controls narcotics or deals in narcotics, but only to those who possess narcotics. Of course possession may be shown by a continuous and undefined control of an agent who holds the narcotics, as where narcotics are carried by a porter in luggage in a railroad station, but here the buying agent haggled on one occasion with McGovern, not Monastersky (44), and when

Monastersky and the agent arrived at the time Monastersky designated they were sent out to stroll the streets for an hour to suit McGovern's convenience in connection with the production of the narcotics. We do not urge that Monastersky's conduct was free of the aura of criminality, but simply that it did not involve that specific kind of conduct, i.e., possession, which Congress saw fit to require as a precondition for invoking the presumption of importation and knowledge of importation.

## REASONS FOR GRANTING THE WRIT

Though the narcotics law constitutes an important part of the federal criminal law, this Court has never spoken on what sort of possession and control other than direct physical possession and control is required in order that the government may avail itself of the presumption contained in § 174 of Title 21. It is quite apparent from the instant case that despite the Draconian nature of the narcotics statutes, the courts, and certainly the Second Circuit, have come to substitute the test of participation in a narcotics transaction for possession of narcotics in invoking the presumption so necessary to the government's proof; there was no evidentiary showing of importation.

Even taking, as we must at this juncture, the government's proof in its strongest posture, the petitioner's role here was that of an arranger, an introducer, a broker. He no more had possession of the narcotics than a real estate broker who brings together a purchaser and a seller and who may actively participate in a negotiation has possession of the real estate. Though there was some testimony of a fleeting touching of the contraband substance by the

petitioner, neither the District Court nor the Court of Appeals relied upon that to invoke the presumption, but rather at most treated it as a circumstance showing constructive possession, and in so doing have extended the scope of a broad and sweeping presumption attached to one of the most stringent provisions of the federal criminal law.

While there may not be a direct conflict between the various circuits in terms of irreconcilable holdings, it is perfectly clear that the same set of circumstances is likely to produce different results. Compare: *United States* v. *Landry*, 257 F. 2d 425 (7th Cir. 1958), where the Seventh Circuit held no possession on the part of an admitted addict where drugs owned by him were held by another for his use.

We respectfully submit that by giving this Court an opportunity to speak definitively for the first time on the meaning of possession in § 174 and to make harmonious the rule in the various circuits, the granting of the writ here is in the interest of the sound administration of justice in the federal courts.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

ROBERT KASANOF
*Attorney for Petitioner Monastersky*

April 1966

# APPENDIX A

## Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 63—September Term, 1965.

(Argued October 20, 1965 Decided February 23, 1966.)

Docket No. 29732

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—v.—

WILLIAM BENTVENA, WILLIAM STRUZZIERI and SAMUEL MONASTERSKY,

*Defendants-Appellants.*

Before:

WATERMAN, MOORE and FRIENDLY,

*Circuit Judges.*

Each defendant was convicted of selling narcotics in violation of 21 U. S. C. §§ 173-74. The United States District Court for the Southern District of New York, McGohey, *J.*, rendered a judgment of guilty after a jury trial, and the defendants appealed. Affirmed.

HOWARD L. JACOBS, Asst. United States Attorney, Robert M. Morgenthau, United States Attorney, Neal J. Hurwitz, Asst. United States Attorney, *for Appellee.*

*Appendix A—Opinion of United States Court of Appeals*

JEROME LEWIS, Brooklyn, N. Y., *for Appellants Bentvena and Struzzieri.*

ROBERT KASANOF, New York City, *for Appellant Monastersky.*

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WATERMAN, *Circuit Judge:*

By this opinion we affirm the convictions of three co-defendants, who, having been charged with violations of 21 U. S. C. §§ 173, 174 on January 6 and January 13, 1959, were each severally found by a jury to be guilty as charged. Samuel Monastersky and William Struzzieri were convicted of unlawful involvement on both occasions, William Bentvena as to the January 13 violation only.[1]

On this appeal, appellants Bentvena and Struzzieri argue that the judgments against them should be reversed and the pertinent counts of the indictment dismissed as to them,[2] because the Government's proof tending to show their guilt was so meager that the trial court erred in failing to direct

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1 The indictment out of which these convictions arise was filed on May 5, 1960. It named twenty-nine defendants and contained eight counts. The first trial on the indictment ended in a mistrial after six months. The second trial resulted in the conviction of thirteen defendants, including the present appellants, on counts four and five charging substantive violations of the narcotics laws and on count eight, the general conspiracy count. On June 13, 1963 our court affirmed the convictions of nine of the defendants but reversed the convictions of appellants and the defendant Salvatore Panico and remanded for a new trial. *United States* v. *Bentvena*, 319 F. 2d 916 (2 Cir.), *cert. denied*, 375 U. S. 940 (1963). This appeal follows the third trial.

2 Appellants Bentvena and Struzzieri seek only a reversal with directions that the indictment be dismissed, they do not seek a new trial.

verdicts in their favor at the close of the Government's case. Appellant Monastersky states his willingness to adopt his codefendants' argument as his own should it commend itself to this court, but he mainly relies upon the argument that the Government should not have been allowed to avail itself of the evidentiary rule contained in 21 U. S. C. §174[3] because it failed to prove he had possession of the heroin that was the subject matter of the transactions of January 6 and January 13. He concludes that without the benefit of this rule his conviction cannot stand. We take up these separate contentions in order.

## I.

The initial issue is whether the evidence presented by the Government during its case-in-chief was sufficient to permit the cases against any or all of these defendants to be submitted to the jury. We look first to the evidence relating to the January 6 transaction in which only Monastersky and Struzzieri were allegedly involved. The case against these two codefendants, based almost entirely on the trial testimony of several federal narcotics agents, can be briefly summarized. On January 5, Agent Giorgio had arranged with Monastersky to purchase from him on

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3 It is a federal offense under Section 174 to import narcotics illegally or to deal in such drugs with knowledge that they have been illegally imported. The statute goes on to provide: "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." In the present case Monastersky argues the Government did not prove he had or had had possession of the heroin which was the subject of the illegal transactions.

the following day one-half kilogram of heroin for $6,000. At about 8:40 P.M. on January 6 several agents observed Monastersky enter 525 East 88th Street. Several minutes later a car arrived on the scene and parked. Struzzieri got out and entered the same building Monastersky had previously entered. A second federal agent, Agent Ward, testified that when Struzzieri left the car and entered the building he was carrying a package wrapped in blue paper on which appeared a white snow man design. Shortly thereafter Struzzieri left the building empty handed and drove off in the same car in which he had arrived. At about 9:30 P.M. one Richard McGovern left 525 East 88th Street carrying a package and proceeded to 448 East 87th Street. A short time later Monastersky brought Agent Giorgio to 448 East 87th Street. There they met McGovern in an apartment in this building, McGovern produced a package wrapped, according to Giorgio, in blue paper on which appeared a white snow man design and the package, when opened, contained a white powder later proved to be heroin. The three men then left the apartment; once outside Giorgio handed McGovern $6,000 and McGovern gave the agent the package, which contained about one-half a kilogram of heroin. Giorgio took the package to an automobile where a third agent, Agent Mangiaracina, was waiting. There was also testimony tending to show that Struzzieri met McGovern for a few minutes later in the evening.

Assuming for the moment that the trial court correctly charged the jury that it could find Monastersky had "possession" of the heroin sold on January 6 sufficient to justify reliance on the rule contained in 21 U. S. C. §174 it is quite

clear that the Government's case against Monastersky relative to this January 6 sale was sufficient to go to the jury. Indeed, the evidence tending to prove that Monastersky was actively involved in this unlawful sale was largely uncontradicted. We surely cannot disturb a jury verdict based on such evidence. See *United States* v. *Dardi*, 330 F. 2d 316 (2 Cir.), *cert. denied*, 379 U. S. 845 (1964).

Whether the Government's case concerning the January 6 sale of heroin made out a case against Struzzieri sufficient to go to the jury is a closer question. Essentially, the Government's case against Struzzieri consists of Giorgio's testimony that he received the heroin from McGovern and Monastersky in a package wrapped in blue paper on which appeared a white snow man design, and the testimony of Ward that he observed Struzzieri carrying just such a package enter 525 East 88th Street shortly after Monastersky had entered the building and only a few hours before a package so wrapped was passed to Giorgio. The Government contends this evidence was sufficient to allow a reasonable jury to find that Struzzieri brought to McGovern and Monastersky the heroin that the latter pair then sold to Giorgio. Struzzieri argues that the issue of his guilt should not have been submitted to the jury because crucial testimony of several narcotics agents was "meager," "remote," and "incredible."

In support of his argument Struzzieri first points to the fact Agent Mangianacina, who waited in an automobile for Giorgio to return with the heroin on the evening of January 6, testified the package Giorgio brought with him to the automobile was brown in color. Unquestionably, this testi-

mony as to the color of the package varied from Giorgio's testimony that the package was blue and white. Nevertheless, the jury could well have determined that Mangiaracina was mistaken in his recollection of the color and that Giorgio's testimony was to be believed. Such a resolution of the variance, which would tend to incriminate Struzzieri, would be supported by the testimony of Agent Ward who stated that the package Struzzieri carried when he entered 525 East 88th Street was wrapped in blue paper on which appeared a white snow man design. We cannot say that such a resolution of this evidential variance would be unreasonable; therefore we should not replace it with our own. This is not a case in which two segments of the Government's proof was absolutely essential to support a conviction and each contradicts the other. *United States* v. *Moret*, 334 F. 2d 887, 893 (2 Cir. 1964) (Waterman, *J.*, dissenting), *cert. denied*, 379 U. S. 993 (1965). Rather, here there was a conflict in the Government's proof, tending to establish only one fact among many facts that together tended to prove Struzzieri was carrying the package that contained the heroin subsequently sold to Giorgio. Undeniably the variance as to the color of the wrapping paper weakened the Government's case against Struzzieri. Nevertheless, the jury concluded the package that Giorgio received from Monastersky and McGovern was the package Struzzieri brought to the latter pair earlier in the evening. We should not disturb this permissible resolution of the variance since this is precisely the sort of task that juries are best able to perform. *United States* v. *Dardi*, *supra*; *United States* v. *Tutino*, 269 F. 2d 488 (2 Cir. 1959).

Struzzieri also contends the Government's case tending to involve him in this January 6 transaction was fatally weak because Agent Ward's testimony that he observed Struzzieri enter 525 East 88th Street carrying a package wrapped in blue paper on which appeared a white snow man design was incredible and unworthy of belief because of the distance separating Ward from Struzzieri and the poor lighting conditions at that time. In other words, Struzzieri's claim is not that the Government failed to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; rather he claims that the physical facts so contradict Ward's testimony as to render that testimony unbelievable. We disagree. Deciding whether certain evidence should be believed is precisely the task set the jury in a prosecution such as this; we should not interfere with the jury's decision in this case that Ward's testimony was credible.

We next turn to consider whether the Government's evidence relating to the January 13 transaction in which all of the defendants were allegedly involved was sufficient to permit the cases against any or all of them to be submitted to the jury. Again, the case against Monastersky, Struzzieri and Bentvena was based almost entirely on the trial testimony of several narcotics agents, and it, too, can be briefly summarized. Agent Giorgio made arrangements with Monastersky to purchase another half kilogram of heroin on January 13 from Monastersky and McGovern for $6,000. On that date, at about 9:25 P.M. Bentvena and Struzzieri arrived in a car on East 88th Street; they parked and entered the apartment building numbered 525. Shortly

thereafter Monastersky came out of this building and met Agent Giorgio who had been waiting in the immediate vicinity for some time. Giorgio introduced Agent Mangiaracina to Monastersky as his partner and while Mangiaracina waited in the lobby of the building Monastersky and Giorgio made their way to apartment 2-H, which was McGovern's apartment. While doing so they met Struzzieri and Bentvena coming toward them in the opposite direction. When Bentvena and Struzzieri arrived in the lobby Mangiaracina observed Bentvena stop and speak into the intercom system; at approximately the same time Giorgio observed McGovern go to the intercom connection in apartment 2-H and speak into it, saying, "Everything is okay." Mangiaracina then saw Struzzieri leave the building, while agents outside saw them walk to their car, remove a brown package from the trunk, and together return to the lobby where Mangiaracina saw them go upstairs again. Shortly thereafter, according to Giorgio, the doorbell rang in apartment 2-H, McGovern answered the bell and returned with a brown package ultimately found to contain heroin. Bentvena and Struzzieri were observed leaving the building a few minutes after their last entry. In the meantime, McGovern had asked Giorgio for the money. Giorgio summoned Mangiaracina, his supposed partner, from the lobby, the agents handed an envelope containing $6,000 to Monastersky, and Monastersky handed the package of heroin to Giorgio. Subsequently Struzzieri and Bentvena returned to 525 East 88th Street, where they remained for about an hour.

Considerations similar to those that caused us to affirm the jury's verdict of guilty based on the evidence relating

to the January 6 sale cause us to hold that the evidence introduced by the Government relating to the January 13 sale was sufficient to support the jury's verdict of guilty as to the latter transaction. Viewing the evidence, as we must, in the light most favorable to the Government, *United States* v. *Tutino, supra,* and recognizing that involvement in an illegal sale of narcotics may be proved by circumstantial evidence, *United States* v. *Moret, supra,* we cannot say that reasonable jurors could not have found beyond a reasonable doubt that Struzzieri and Bentvena delivered the heroin to Monastersky and McGovern which they, in turn, sold and delivered to Giorgio. And, of course, Monastersky's involvement in the transaction is firmly established.

## II.

We now examine the claim of appellant Monastersky that his conviction on both counts should be reversed because, as the record does not show that the heroin sold to the agents was illegally imported, or that Monastersky knew from where it came, his conviction can only stand if the Government proved he had "possession" of the drugs,[4] which he maintains, the Government failed to do. Monastersky contends the Government's proof establishes only that he was a "casual facilitator" of the sales in question, in other words that he merely introduced a willing seller to a willing buyer, activity that we held was insufficient to establish possession, either actual or constructive, in *United States* v. *Jones,* 308 F. 2d 26 (2 Cir. 1962). We disagree with appellant. We believe the evidence in this case estab-

4 See note 3, *supra.*

lished that Monastersky had, on both occasions, power to control the disposition of the heroin sufficient to constitute "possession" within 21 U. S. C. §174. See *United States* v. *Jones, supra.* In *Jones* we reversed a conviction under §174 that equated mere participation in a sale of narcotics with "possession" of the narcotic drug. In discussing the facts of that case we said:

> We believe the evidence in this case negates a conclusion that defendant Jones had dominion and control over the narcotics handed to Brown by Moore. The pains Jones took in the first instance to find Moore indicate that Jones was unable to consummate the transaction as a business dealing of his. The price and place of delivery were not even discussed with the would-be purchaser until defendant spoke with Moore. No one can say that Jones established these essential details of the affair unless he engages in speculation wholly unwarranted by the trial record. After consummation of the transaction Moore told agent Brown to purchase directly from him in the future and not to deal with anyone else. This statement by Moore negates a finding that Jones could assure, as a matter of course, delivery by Brown to a customer Jones might discover. [308 F. 2d at 31.]

The facts here are quite different. On both January 6 and January 13 Monastersky apparently set the price of the heroin without consulting with McGovern. On January 6 Monastersky was in the building when Struzzieri delivered the heroin. At both sales to Giorgio, Monastersky remained with McGovern throughout. And during the January 13 transaction Monastersky had the heroin package in his

hands, Giorgio paid the money directly to Monastersky, and Monastersky handed the heroin directly to Giorgio. This evidence brings Monastersky's case well within our statement in *Jones* that "evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery, may well be sufficient to charge the defendant with a constructive possession of the narcotics . . ." 308 F. 2d at 31.

Monastersky also contends that the trial court's charge relating to constructive possession was improper. We would be hard pressed to detect error in this charge. In any event, since Monastersky failed to object to the charge at trial, or to request a different charge, he may not, barring special circumstances not present here, raise the issue on appeal. See *United States* v. *Indiviglio,* 352 F. 2d 276 (2 Cir. 1965), *cert. denied,* Feb. 21, 1966, —— U. S. ——.

Affirmed.

# APPENDIX B

## Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of February one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
*Circuit Judges.*

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DALE KAISER, et al.,

Defendants,

WILLIAM BENTVENA and WILLIAM STRUZZIERI,
SAMUEL MONASTERSKY,

Defendant-Appellants.

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Appeal from the United States District Court for the Southern District of New York.

*Appendix B—Judgment of United States Court of Appeals*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed.

A. DANIEL FUSARO
Clerk